

JEWISH IDENTITY'S IMPACT IN A NUTSHELL

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Sir Jonathan Sacks, the former Chief Rabbi of the United Hebrew Congregations of the Commonwealth,¹ was approached by a group of Jewish university students seeking advice in planning a course for the coming year.² He suggested that many Jews were involved in exciting and significant endeavors—as artists, academics, judges, doctors, politicians, heads of eleemosynary enterprises, and the like. He therefore recommended the students write to a number of such people, soliciting personal statements as to what being Jewish meant to them. The students could then compare these texts with some of the “classic statements” of the Jewish tradition and could “construct a fascinating series of discussions on what being a Jew might mean to you.”

Alas, after some months elapsed, Rabbi Sacks inquired as to the status of the project. The students told him that although they had sent almost two hundred inquiries, only six people had replied. Because all six people indicated they regarded their Jewish identity as either an accident, or a malady, the responses were quite troubling.³

The DePaul University College of Law's Center for Jewish Law & Judaic Studies (JLJS) undertook Rabbi Sacks' suggestion in a more limited, yet more intensive way. JLJS focused on persons involved of a single subtopic—constitutional law—but it convinced many of the most prominent Jewish members of America's constitutional law academy to make thoughtful, public presentations on how their sense of Jewish identity influenced their personal careers, as practitioners or scholars. Many of those presentations are reflected in the essays included in this volume.

Although I am not a constitutional law professor—but rather a law professor whose scholarship focuses on Jewish law and the

¹ The United Hebrew Synagogues is the largest organization of Jewish synagogues in the United Kingdom, and its Chief Rabbi is often referred to as the Chief Rabbi of the United Kingdom.

² JONATHAN SACKS, A LETTER IN THE SCROLL 1 (2000).

³ One of the respondents referred to the definition of Judaism that he had heard from a young Israeli boy: "Judaism, he said, is a hereditary illness. You get it from your parents, and also pass it along to your children.' And why call it an illness?' I asked. 'Because not a small number of people have died from it,' he answered." *Id.* 2–4.

interrelationships between the Jewish and secular legal systems—my task as co-director of JLJS⁴ (as well as an ordained Orthodox rabbi), and as the last presenter, was to address the broader issue of the influence of one's Jewish identity. My thesis, perhaps unsurprisingly, was that a person's Jewish identity (along with other factors) not only importantly affects a person's life as a legal expert, but that it plays a critical role in one's conduct as an investment banker, a physicist, a psychologist—or just as a human being.

Although I could probably point to myriads of ways in which Jewish teachings have influenced me, in this short essay I cite three. First, Judaism teaches that a person is responsible for one's actions and accountable for one's choices. Each person enjoys free will to do either good or evil. This lesson is rather dramatically illustrated in the narrative in Genesis in which Jacob sends Joseph to the countryside to check on the welfare of his brothers. Most of the brothers (for reasons too complex to explore at this point) express a desire to put Joseph to death. One brother, Reuben, convinces the others not to execute Joseph but, instead, to put him into a pit, and the Biblical text states that Reuben “rescued him [Joseph] from their hands.”⁵ But Jewish tradition states that the pit was full of poisonous snakes and scorpions!

One must ask: how could putting Joseph into such a pit be deemed a rescue? The early 18th-century Moroccan scholar, Rabbi Chayim ben Attar, explains that because Joseph's brothers possessed free will, they could have killed Joseph even if he did not deserve to die. Animals, however, lack free will.⁶ Consequently, if Joseph were innocent, the snakes and scorpions could not kill him. By convincing the others to place Joseph in a pit (from which Reuben planned to later release him), Reuben therefore saved Joseph's life.⁷

One consequence of free will is optimism. Through the ability to make moral choices, we can improve ourselves. By being able to improve ourselves, we can improve the world.⁸ Judaism utterly rejects the perspective, expressed in ancient Greek tragedy, that

⁴ I am currently the sole director of JLJS.

⁵ *Genesis*. 37:21

⁶ 1 CHAYIM BEN ATTAR, OR HACHAYIM: COMMENTARY ON THE TORAH 310 (Eliyahu Munk trans., 1999).

⁷ *Id.* There are some who disagree with Rabbi Attar's understanding of “free will,” but his is the view that resonates with me.

⁸ SACKS, *supra* note 2, at 97.

we are doomed to an inescapable fate.⁹ As Rabbi Sacks points out, while Greek oracles predicted the future, Jewish prophets urged repentance to avoid an undesirable future.¹⁰

A second consequence of free will is an awareness of personal accountability. The ability to choose one's actions gives rise to responsibility for those actions. Thus, we are religiously obliged to disobey orders to engage in morally wrongful conduct. The argument that, "I was only following orders" is unacceptable. As the Talmudic sages rhetorically ask, "[When] the words of the master {i.e., G-d} and the words of the pupil {i.e., another person} [are in conflict], whose are obeyed?"¹¹ Similarly, as I have discussed in detail elsewhere, Judaism rejects the notion of "role-differentiated morality," which posits different ethical standards for persons based on whether they belong to one profession or another.¹² From a Jewish perspective, a person's profession may indirectly affect how he or she should act, but it does not directly dictate that decision.¹³ For example, assume that a secular legal ethics rule requires an attorney to maintain a client's confidence even if doing so would enable the client to victimize a third party. By contrast, Jewish law generally requires a person to protect

⁹ *Id.* at 102.

¹⁰ *Id.*

¹¹ BABYLONIAN TALMUD, *Kiddushin*, 42b; *Baba Kama* 56a; *Sanhedrin* 29a; *Temurah* 25a. Although the English translation of this passage is taken from the Soncino translation of the Babylonian Talmud found at <http://halakhah.com/>, I added the expressions {i.e., G-d} and {i.e., another person} for clarity.

¹² See, e.g., Steven H. Resnicoff, *Helping A Client Violate Jewish Law: A Jewish Lawyer's Dilemma*, in JEWISH LAW ASS'N STUDIES X (H.G. Sprecher ed., 2000).

¹³ Perhaps it would be useful to point out the principal way in which a profession may indirectly affect a person's Jewish law responsibilities. In only rare instances does Jewish law impose an absolute responsibility to do, or refrain from doing, a particular act. Instead, the general rule is that a person must only actively fulfill a given Jewish law obligation if doing so will not cost more than twenty percent of the person's wealth, while a person must refrain from violating a Jewish law prohibition even if this will cause the loss of all of the person's wealth. In some cases, violating the rules of one's profession could subject a person to extensive civil liability (as well as to a suspension or revocation of the person's license). See STEVEN H. RESNICOFF, UNDERSTANDING JEWISH LAW §4.03, at 39–41 (2012). Consequently, whether Jewish law actually requires a member of a particular profession to take a specific action could indirectly depend on a variety of factors, such as the applicable professional rule, the likely consequences of violating the rule, and the person's financial condition.

others from harm.¹⁴ Consequently, Jewish law would not generally countenance confidentiality in such circumstances.

Second, Judaism provides important lessons regarding disagreements. Initially, it teaches one to expect them. The Jerusalem Talmud teaches that just as people's faces differ one from the other, their opinions and outlooks differ as well.¹⁵ But the fact that disagreements are inevitable does not mean that efforts should not be made to resolve them, especially when they involve questions of right and wrong. The question is how such efforts should proceed. Jewish tradition provides guidance on this as well.

In that portion of the Mishnah that is known as The Ethics of the Fathers, the sages write the following:

Any dispute that is for the sake of Heaven will have a constructive outcome; but one that is not for the sake of Heaven will not have a constructive outcome. What sort of dispute was for the sake of Heaven? - The dispute between Hillel and Shammai. And which was not for the sake of Heaven? - The dispute of Korach and his entire company.¹⁶

Understanding the significance of this Mishnah requires a few background facts. Who were Hillel and Shammai? They were Jewish leaders during the century before and the century after the start of the Common Era. Each was cordial and engaging,¹⁷ and each had many students. Although they and their students disagreed on matters of great consequence, they trusted one another implicitly.¹⁸

¹⁴ See, e.g., Steven Resnicoff, *The Attorney-Client Relationship: A Jewish Law Perspective*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 349, 365 (2000).

¹⁵ JERUSALEM TALMUD, *Berakhot* 9:1. See also Norman Lamm, "Passover And Human Diversity," at http://www.yutorah.org/lectures/lecture.cfm/723410/Rabbi_Norman_Lamm/Passover_And_Human_Diversity.

¹⁶ See RABBI NOSSON SCHERMAN, *THE COMPLETE ARTSCROLL SIDDUR* 577 (Rabbi Meir Zlotowitz, ed., 1994).

¹⁷ Although Shammai had little patience for those who seemed to make sport of the Torah, see Babylonian Talmud, Sabbath 31a, he is the authority cited for teaching that one should greet everyone with a cheerful countenance. *Id.* at 549 (citing *Ethics of the Fathers* 1:15).

¹⁸ See MISHNAH, *Yevamot* 1:4; BABYLONIAN TALMUD, *Yevamot* 14a, available at <http://halakhah.com/pdf/nashim/Yevamoth.pdf> (English translation of the relevant Talmudic passage).

Who were Korach and his company? They are prominently featured in the Pentateuch, in the Book of Numbers. They came together to dispute the leadership roles of Moses and Aaron. Korach argued that Moses had no right to exercise authority over the people of Israel, all of whom, Korach said were prophets. Korach's incitement led the two hundred and fifty people, described as "Korach's company," to attempt to supplant Aaron as the High Priest. According to Jewish tradition, both Korach and his company improperly acted to advance their personal agendas and were divinely and decisively punished.

In light of this information, the language of the Mishnah seems problematic. The reference to the dispute between Hillel and Shammai understandably mentions both sides of the disagreement. The reference to Korach and his company curiously does not. Korach and his company were on the same side; they had no quarrel with each other.

Rabbi Shimon Schwabb (1908-1995) explains the Mishnah's lack of parallelism. He states that when there is a debate for the sake of Heaven, each party seeks the truth. Each realizes that there is another side to the dispute and carefully considers the other side's arguments. This process was best exemplified by the debates of Hillel and Shammai. In fact, the Mishnah and Talmud explain that, on a number of occasions, their debates resulted in agreements.¹⁹

By contrast, an argument that is pursued for one's private benefit is often pretextual. A party that only seeks its own benefit rather than the truth often fails even to acknowledge the existence of another perspective. This is reflected by the Mishnah's describing such a debate only by reference to the side taken by Korach and his company.²⁰

That one must listen to both sides of an argument is not only an important life lesson, it is important for effective lawyering. For example, one of the most effective ways to prepare for oral argument before an appellate court is to identify the strengths of your adversary's case and the weaknesses of your own. This enables a person to anticipate the questions he or she may need to field. Honestly acknowledging the strengths of the other side's perspective is also essential to correctly counseling a client. One needs to evaluate whether it behooves a client to stand pat, or

¹⁹ See, e.g., MISHNAH, *Eduyot* 1:12.

²⁰ *Id.*

perhaps, to seek a settlement rather than to run the risk of substantial court costs as well as a possibly adverse judgment. Heedlessly proceeding to litigation could be quite counter-productive.

The third, and last, Jewish teaching that I will mention here is that there are few absolutes. Most situations involve competing Jewish values that ostensibly require contradictory conclusions. Thus, Jewish law strongly criticizes prevarication. Indeed, the sages say that honesty is the seal of G-d's signature.²¹ Yet, Judaism rejects Kant's view that telling the truth is a categorical imperative. In fact, if necessary to save a life, Jewish law requires one to lie.²²

What if the goal at stake, although proper, is less worthwhile than saving a life? The answer is that it depends. For example, one may need to balance the objective to be accomplished against the possibility that, through the dishonesty, the person may become habituated to lying. Thus, Jewish law teaches that ethical decisions, in the language of the legal profession, are often "fact-sensitive."

In addition, even when a particular act might otherwise be unambiguously required, Jewish law cautions one to consider the burden such action might entail. Thus, a person is enjoined not to exhaust all of one's wealth in order to fulfill any particular affirmative commandment. Similarly, one is generally not even entitled to sacrifice one's life to avoid violating a Torah prohibition. The rules regarding the permissible and impermissible burdens attendant to the observance of diverse Jewish laws underscores the tensions between and among Jewish values.

Moreover, while Jewish law prescribes certain acts and proscribes others, there are some situations in which it does neither. It may encourage or discourage particular decisions—or it may leave the ultimate judgment to the individual, who will need to identify and weigh the diverse ethical interests at play.

Of course, there are many specific legal skills, such as logical reasoning and literary analysis, which one may acquire or hone through the study of Jewish texts or legal literature. To me, however, the development of those skills is far less remarkable than the three principles I have discussed. But I should mention

²¹ Steven H. Resnicoff, *Lying and Lawyering: Contrasting American and Jewish Law*, 77 NOTRE DAME L. REV. 937, 957-60 (2002).

²² *Id.* at 960-67.

one more thing. I began by discussing the principle of free will - and the optimism and accountability that it entails. Implicit in such optimism and accountability is the obligation to use one's free will to improve society.